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Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

SAMUEL and CHERYL SANDAGE
Petitioners,

v.

BANKHEAD ENTERPRISES, INC.
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Federal Circuit Court in a diversity case can nullify dispositive substantive state law and create Federal common law.

PARTIES BELOW

All parties to the proceeding in the Court of Appeals are identified in the caption.

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OPINIONS BELOW

The Order of the Eighth Circuit denying the petition for rehearing en banc and by the panel is attached hereto at Page A-11. The opinion of the Eighth Circuit is reported at ___ F. 3d ____, 1999 WL 305066 (8th Cir.(Mo.) 1999) and is attached hereto at page A-1. The opinion of the trial court denying respondent's alternative motions for judgment as a matter of law, a new trial and remittitur is attached hereto at page A-12.

JURISDICTION

The judgment of the Eighth Circuit was entered on May 17, 1999. Petitioner's Request for Rehearing by panel and rehearing en banc in the Eighth Circuit was denied on June 18, 1999. A-11. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Revised Statutes of Missouri § 537.765 (1987) **Contributory fault as a complete bar to plaintiff's recovery abolished-doctrine of comparative fault to apply-fault of plaintiff an affirmative defense to diminished damages-fault defined.**

1. Contributory fault, as a complete bar to plaintiff's recovery in a products liability claim, is abolished. The doctrine of pure comparative fault shall apply to products liability claims as provided in this section.

2. Defendant may plead and prove the fault of the plaintiff as an affirmative defense. Any fault chargeable to the plaintiff shall diminish proportionately the amount awarded as compensatory damages but shall not bar recovery.

3. For purposes of this section, "fault" is limited to:

(1) The failure to use the product as reasonably anticipated by the manufacturer;

(2) Use of the product for a purpose not intended intended by the manufacturer;

(3) Use of the product with knowledge of a danger involved in such use with reasonable appreciation of the consequences and the voluntary and unreasonable exposure to said danger;

(4) Unreasonable failure to appreciate the danger involved in use of theproduct or the consequences thereof and the unreasonable exposure to said danger;

(5) The failure to undertake the precautions a reasonably careful user of the product would take to protect himself against dangers which he would reasonably appreciate under the same or similar circumstances; or

(6) The failure to mitigate damages.

(L.1987 H.B. 700 § 36)
Effective 7-1-87

STATEMENT OF THE CASE

On August 15, 1997, after a four day trial, a jury returned a verdict in favor of the petitioners. Petitioners had filed a products liability action against respondent in a Missouri State Court on November 22, 1995. Respondent timely removed the action to Federal Court based on diversity. 28 U.S.C. §1332. Petitioners were citizens of Missouri while Defendant was a Georgia Corporation with its principle place of business in Georgia.

Petitioner suffered a career-ending back injury on December 17, 1990, as a result of modifications performed on an automobile trailer by the respondent.(A-3) Petitioner alleged the auto-

mobile transport trailer was unreasonably dangerous in that it lacked adequate room to safely exit a loaded vehicle. Evidence at trial established that Bankhead's redesign added four and a half feet to the length of the trailer and the width of the supporting structure for the overhead ramps was increased more than six fold, from four inches to twenty-five inches.(A-2-3) When parked where the loaded auto "needed to go", the increased obstruction from the widened support member restricted the opening of the door from which Mr. Sandage had to leave the auto.(A-3, 4) Attempting to squeeze his six foot one, two hundred pound frame through a six and a half inch available space, Mr. Sandage injured his back, resulting in four surgeries and leaving the thirty-nine year-old truck driver with permanent and disabling injuries.(A-3)

Expert testimony was presented on behalf of the petitioner and respondent. The jury returned verdicts on Petitioner's Missouri State Law claims premised on negligence and strict products liability. On March 23, 1998, the trial court denied Respondent's alternative motions for judgment as a matter of law, new trial, and remittitur, finding them to be "without merit". (A-12) Respondent timely appealed to the Eighth Circuit basing jurisdiction on 28 U.S.C. § 1291.

The Eighth Circuit reversed the verdict and judgment of the trial court. The Eighth Circuit held that the defect was "open and obvious" and the car hauler was not defective under the "consumer expectation" test, therefore barring recovery as a matter of law.(A-6-9)

REASONS FOR GRANTING THE WRIT

1. ***ERIE v. TOMPKINS*** **MANDATES THAT FEDERAL COURTS FOLLOW SUBSTANTIVE STATE LAW IN DIVERSITY CASES. THE EIGHTH CIRCUIT ABANDONED THIS PRINCIPLE WHEN IT RE-**

FUSED TO FOLLOW MISSOURI LAW GOVERNING PRODUCT LIABILITY ACTIONS. THIS COURT NEEDS TO POSITIVELY REAFFIRM THAT CIRCUIT COURTS IN DIVERSITY CASES FOLLOW SUBSTANTIVE STATE LAW.

Since *Erie v. Tompkins*, this Court has uniformly mandated that Federal Courts in diversity actions follow substantive state law. *Salve Regina College v. Russell*, 499 U.S. 225, 112 S. Ct. 1217, 1218 (1991). Even with this said, this Court does not "normally grant petitions for certiorari solely to review what purports to be an application of state law...", *Leavitt v. Jane L.*, 518 U.S. 137, 116 S. Ct. 2068, 2072. However, this Court has clearly stated that review is necessary where the alternative is to allow "blatant federal-court nullification of state law", "overreaching by lower federal courts", and "state law determinations that seem plainly wrong". *Id at p. 2072.*

In the case at bar, an Eighth Circuit panel consisting of judges from South Dakota, Nebraska, and Minnesota reversed an Eastern District Court of Missouri on a point of Missouri law. This was a point of law that the trial judge, the late Honorable George Gunn, a former member of the Missouri Supreme Court, found to be without merit.(A-12) While, as this Court has indicated, the Circuit Court "owes no deference to district court adjudications of state law, " *Id at p. 2072*, certainly Circuit Courts must not be allowed to acts as "Star Chambers", subject to no rebuke. Allowing circuit courts to develop 'the "brooding omnipresence" of Federal common law in diversity cases will effectively recreate the dichotomy that existed prior to *Erie v. Tompkins. Salve*, 111 S.Ct. at 1218.

2. **THE EIGHTH CIRCUIT'S DETERMINATION THAT AN OPEN AND OBVIOUS DEFECT BARRED RECOVERY WAS ABSOLUTELY CONTRARY TO MISSOURI REVISED STATUTES § 537.765. FUR-**

THER, THE FINDING THAT PETITIONER'S CLAIM WAS BARRED BY THE CONSUMER EXPECTATION TEST WAS PLAINLY WRONG AS THE MISSOURI SUPREME COURT HAS NOT ADOPTED THE CONSUMER EXPECTATION TEST AND LITIGANTS ARE FREE TO ARGUE ANY THEORIES OF UNREASONABLY DANGEROUS.

In 1987, Missouri replaced state common law regarding product liability with a comprehensive statute which provided, in part:

> 1. Contributory fault, as a complete bar to plaintiff's recovery in product liability claim, is abolished. The doctrine of pure comparative fault shall apply to products liability claims as provided in this section.
>
> 2. Defendant may plead and prove the fault of the plaintiff as an affirmative defense. Any fault chargeable to the plaintiff shall diminish proportionally the amount awarded as compensatory damages but shall not bar recovery.
>
> 3. For the purposes of this section, "fault" is limited to:.....
>
> (3) Use of the product with the knowledge of a danger involved in such use with reasonable appreciation of the consequences and the voluntary and unreasonable exposure to said danger[.]

RSMO § 537.765 (1987).

Missouri Courts, in cases postdating the enactment of this statute, have held the "open and obvious" nature of the defect no longer justifies a directed verdict. *Miller v. Varity Corp.*, 922 S.

W. 2d 821, 826 (Mo.App.E.D.1996) (application to transfer denied). *Miller* noted:

> Defendant's "*open and obvious*" argument fails because Missouri enacted a statute in 1987, which abolished contributory fault as a complete bar to plaintiff's recovery....
>
> ....
>
> Under this statute, *the open and obvious nature of the defect* is directly addressed in subsection 3(3). Evidence that the defect was readily apparent *would not bar plaintiff recovery*, but could be properly considered in apportioning fault. *Id.* (emphasis added)

Likewise, in *Wilson v. Danuser Machine Company, Inc.*, 874 S.W. 2d 507 (Mo. App. S.D. 1994)(application to transfer denied), the plaintiff had his fingers amputated by a log splitter. *Id.* 508. Mr. Wilson *admitted* that he knew before the accident "there was an open and obvious danger of getting his hand caught between a log and the wedge when the log splitter was in operation." *Id.* 509. (emphasis added) Despite this, plaintiff claimed the log splitter was unreasonably dangerous. *Id.* 513. The Missouri Court agreed that a submissible case was made given that alternative designs would have reduced or eliminated log movement or removed the possibility of an operator inadvertently reacting to such movement. *Id.* Given Mr. Wilson's "admitted knowledge of the danger of getting his hand caught between the log and the wedge" the court held that it was proper to submit a contributory fault instruction as the court acknowledged the applicability of § 537.765. *Id.* 510.

Amazingly, other panels of the Eighth Circuit have agreed, in recognition of §537.765, that under Missouri law, even when the Plaintiff understands the danger posed by a product, a strict liability defective design case is properly submitted and the

obviousness of a danger does not entitle a party to summary judgment. *Anderson v. F.J. Little Machine Company,* 68 F.3d 1113, 1116 (8th Cir. Mo.) 1995). *Anderson* noted:

> The dissent places more emphasis on obviousness than our cases justify. *Drabik* rejected the argument that knowledge of the risk compelled judgment for the manufacturer. 997 F 2d at 505-06. Obviousness does not trump all other factors in determining what is unreasonably dangerous. That the obviousness of material stops far short of compelling judgment for the manufacturer, and indeed demonstrates that a fact finder must consider the issue. The question is whether the machine creating an unacceptable risk of causing preventable accidents, and we held such a claim submissible in *Drabik,* 997 F 2d at 505-06.

Despite this clear precedent, the Eighth Circuit nonetheless concluded Petitioner's claims were barred as the danger was open and obvious. To reach this conclusion, the Eighth Circuit amazingly relied on *Pree v. Brunswick Corp.* 983 F 2d 863,868 (8th Cir. 1993) and *Linegar v. Amour of Am. Inc.,* 909 F 2d 1150,1154 (8th Cir. Mo. 1990). However, both of these cases involved incidents that occurred prior to the effective date of the Missouri products liability statute on July 1, 1987. See *Burgess v. Suzuki Motor Co. Ltd.,* 71 F 3d 304,307 (8th Cir. Mo. 1995) at footnote #6 (noting "Missouri has codified this strict liability cause of action for claims that accrue *after* July 1, 1987.") The incident in *Linegar* occurred 4/15/85, *prior* to § 537.765's effective date of July 1, 1987. 909 F. 2d at 1151. *Pree's* incident occurred on 7/5/85. 983 F.2d at 864.

The Eighth Circuit also held Petitioner's claim was barred by the "consumer expectation test." (A-8). The court did so even while acknowledging that the Missouri Supreme Court has not even adopted the "consumer expectation test and litigants are free to argue *any* theories of unreasonably dangerous." A-8

citing *Newman v. Ford Motor Co.*, 975 S.W. 2d 147, 153-154 (Mo. banc 1998). (emphasis added). *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 506 (8th Cir. 1993) (Missouri courts have not expressly adopted the consumer expectation test).

In summary, the opinion of the Eighth Circuit was absolutely contrary to a substantive Missouri statute and case law subsequent to it's enactment. While the Eighth Circuit may have felt that "dangerousness was apparent", the defect was "open and obvious" and that this was not "the type of determination that should be submitted to the jury", pursuant to a duly enacted statute of the Missouri legislature and the commands of the Missouri Supreme Court, this was a jury question. Mo. Rev. Stat. § 537.765; *Newman*, 975 S.W.2d at 153-154.

Because the Eighth Circuit's opinion was plainly wrong, nullifies a Missouri Statute, ignores Missouri case law, and attempts to re-create Federal common law in diversity cases, Petitioner is entitled to a reversal of the judgment of the Eighth Circuit and a remand with instructions to reinstate the verdict of the jury and the judgment of the trial court.

CONCLUSION

For the reasons stated herein, certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-2171

Samuel Sandage; Cheryl Sandage,	*	
	*	
Plaintiffs/Appellees,	*	
	*	
v.	*	Appeals from the
	*	United States
Bankhead Enterprises, Inc.,	*	District Court
doing Business as	*	for the Eastern
Bankhead Transportation	*	District of
Equipment Company,	*	Missouri.
	*	
Defendant/Appellant.	*	
	*	
Cottrell, Inc.,	*	
	*	
Defendant.	*	

Submitted: December 18, 1998
Filed: May 17, 1999

Before WOLLMAN[1] , BEAM, and LOKEN, Circuit Judges

BEAM, Circuit Judge.

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1 The Honorable Roger L. Wollman became Chief Judge of the United States Supreme Court of Appeals for the Eighth Circuit on April 24, 1999.

Bankhead Enterprises, Inc., appeals a jury verdict awarding damages for products liability. The claim, based on theories of negligence and strict liability, resulted from modifications Bankhead made to an automobile transport trailer. Samuel Sandage claims that the modifications caused him injury. The jury agreed and awarded $1,657,516. Bankhead argues on appeal that judgment as a matter of law is appropriate. We agree.

I. BACKGROUND

In 1976, Sandage began working as a driver for a company that transports automobiles. He worked there from 1976 to 1981 and then again from 1986 until 1990. The company hauls automobiles for manufacturers such as Chrysler, and uses several brands of trailers. Sandage drove a truck using a trailer manufactured by Cottrell, a model CS-11. He loaded approximately 2,700 cars each year. As the name indicates, the Cottrell CS-11 is a multiple level trailer that can transport eleven vehicles at a time, depending on the size, in eleven separately numbered spaces. The schooling included information on the loading of various trailers and on any model changes. The particular placement of vehicles in the numbered positions was left to the discretion of the driver.

The Cottrell CS-11 was modified by Bankhead, a defendant in this action. Its length was extended by four and one-half feet. The extension was accomplished by cutting the trailer virtually in half. A four and one-half foot section was then inserted in the middle, just in front of loading position number one. In the original trailer design there were supporting posts on each side of the trailer near the front of the number one position. The Bankhead modification did not move these original supporting posts, but added four and one-half feet to the front of them. Thus, if a vehicle is loaded further forward in the number one position, because of the modification, the original posts are more to the rear in relationship to the vehicle. The modification also entailed

adding a second supporting post approximately seventeen inches in front of the original posts. Steel plates were then added, connecting the two supporting posts.

On December 17, 1990, Sandage was loading vehicles onto the modified CS-11. Although he cannot remember whether he drove the vehicle forward or backed it in, Sandage loaded a car in the number 1 position. Without remembering how far forward he positioned the vehicle in the number one position, Sandage testified that he put the car "where it needed to go," based on weight distribution factors.

After he parked the car, Sandage realized that when opening the door, it would not move outward fully, but instead would hit the Cottrell post or the Bankhead post and the connecting plates. Thus, to protect against damage to the new car, he placed a glove between the door and the vertical obstruction, and he proceeded to squeeze out. Sandage's expert calculated that there were six and one-quarter inches available for egress. As he attempted to squeeze his six-foot-one-inch and approximately 200-pound frame out of this small opening, Sandage twisted and turned his body. Once he had cleared the tight spot, his body lurched forward and he hit his head on the trailer structure above the number one position. Sandage then completed loading the trailer, took some aspirin, and eventually delivered the load of automobiles. In the course of delivering the load, severe soreness began to develop in Sandage's lower back. He went to his family doctor and then to the company doctor. The lower back injury eventually required four surgeries and he is no longer able to work as a car hauler.

Sandage and his wife brought this products liability suit against Cottrell, for the original design of the CS-11 trailer, and Bankhead, for the modifications. As indicated, they assert theories of strict liability and negligence. Sandage alleges personal injury and his wife alleges loss of consortium as a result

of her husband's injury. The jury found Bankhead liable for compensatory damages for personal injury based on product defect, assessing 100% of the fault to Bankhead. On the negligence claim, the jury found Bankhead liable for compensatory damages for personal injury, assessing 75% of the fault to Bankhead and 25% of the fault to Sandage. The jury awarded $1,557.516 for the injury to Sandage and $100,000 to his wife for loss of consortium. Cottrell was not found liable. The district court denied Bankhead's renewed motion for judgment as a matter of law, and Bankhead appeals.

II. DISCUSSION

Missouri substantive law controls this case. Under Missouri law, a products liability claim can be framed in strict liability, negligence, or breach of warranty theories. *See Linegar v. Armour of Am., Inc.*, 909 F.2d 1150, 1152 (8th Cir. 1990). Bankhead argues that the facts of this case cannot support, as a matter of law, the strict liability or negligence theories advanced by the Sandages. Following a jury verdict, we review the sufficiency of the evidence, with the record analyzed in a light most favorable to the Sandages. *See Pree v. Brunswick Corp.*, 983 F.2d 863, 867 (8th Cir. 1993)

A favorable view of the evidence shows that Bankhead extended the Cottrell CS-11 trailer four and one-half feet, thereby allowing Sandage to pull a car forward some additional amount. If a car was pulled forward, it meant that the driver's door would hit a side-post more towards the rear of the loaded car than it would in an unmodified trailer. Sandage parked in a position "where it needed to go," which blocked the door and restricted his egress. An expert, judging the available space for exit to be six and one-quarter inches, opined that the modified trailer was defective and unreasonably dangerous. The jury accepted these threads of evidence and awarded $1,657.516. We conclude that this evidence is insufficient to support either a

strict liability or negligence theory.

A.Strict Liability

The necessary elements for a strict liability claim are provided by statute[2]. The salient inquiry in a case such as this is whether the product "creates an unreasonable risk of danger to the consumer or user when put to normal use." *Miller v. Varity Corp.*, 922 S.W. 2d 821,825 (Mo. Ct. App. 1996). Bankhead argues that the modified trailer was not defective and unreasonably dangerous as a matter of law, and in any event, the evidence was insufficient to show that the modification caused the injury.

A strict liability claim is set within the background principle that manufacturers are not liable "'simply because the use of their products involve some risks.'" *Pree*, 983 F.2d at 868 (quoting *Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1507 (11th Cir.1990)). Every product has some coloring of risk. We do not

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2 Under the title "products liability", Missouri Statute provides:

As used in sections 537.760 to 537.765, the term "products liability claim" means a claim or a portion of a claim in which the plaintiff seeks relief in the form of damages on a theory that the defendant is strictly liable for damages because:

(1)The defendant, wherever situated in the chain of commerce, transferred a product in the course of his business; and

(2)The product was used in a manner reasonably anticipated; and

(3)Either or both of the following:

(a)The product was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and the plaintiff was damaged as a direct result of such defective condition as existed when the product was sold; or

(b)The product was then unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics, and the plaintiff was damaged as a direct result of the product being sold without adequate warning.

Mo. Rev. Stat. § 537.760.

permit products liability law to restrict the manufacture of products to "only one version of a product, that being the very safest design possible." *Linegar*, 909 F.2d at 1154. Instead, the law demands that we focus our efforts on defects that are unreasonably dangerous.

The expression, "unreasonably dangerous," has been the subject of great dispute. *See, e.g., Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 377-78 (Mo. 1986) (en banc) (finding that Missouri follows the minority approach in defining "unreasonably dangerous"). The result in Missouri has been to leave the interpretation largely as "a matter of common sense, the court's or the jury's." *Linegar*, 909 F.2d at 1153. Although the determination of unreasonably dangerous was presented to the jury "without further definition," as is required by the Missouri cases, *see Nesselrode*, 707 S.W.2d at 378, we conclude that the case should not have reached that point.

Sandage's threads of evidence are not sufficient to weave a tapestry strong enough to withstand the weight of common sense. Sandage loaded cars on a trailer thousands of times, and testified that on that day he parked the car in question "where it needed to go." When he did so, he opened the door and it would clearly not open enough to allow simple exit. Instead of adjusting the vehicle to allow for safe egress, which was within his discretion, he squeezed, manipulated, and twisted his large frame out through a small opening. These facts do not describe a product that is defective and unreasonably dangerous in the face of basic principles.

First, the "'obviousness of a defect or danger is material to the issue whether a product is unreasonably dangerous.'" *Linegar*, 909 F.2d at 1154 (quoting *McGowne v. Challenge-Cook Bros., Inc.*, 672F.2d 652,663 (8th Cir. 1982)(emphasis omitted)); *cf. Miller*, 922 S.W.2d at 826 (concluding that the open and obvious nature of a defect cannot bar recovery, but can be properly

considered). "'Patent and obvious'" dangers are not the "'sort that a jury should resolve.'" *Pree*, 983F.2d at 868 (quoting *Elliott*, 903 F.2d at 1507). What could be more obvious than a door hitting a post and providing too little room to exit? Dangerousness was apparent. It is not the type of determination that should be submitted to a jury.[3]

Although the design of the allegedly defective product was patently obvious, Sandage implicitly argues that he was forced to park the vehicle in the chosen location because that is "where it needed to go," thus attempting to eviscerate the obviousness of the danger. This does not follow simple logic. Sandage clearly testified that he had discretion to position cars on trailers based on many factors. Weight distribution appears to be the most important of those factors. Despite not remembering any detail whatsoever concerning the actual placement of the vehicle at issue, it is undisputed that he could pull forward or back-in, adjust other vehicles, alter the placement and type of automobiles in the numbered spaces, and make any adjustments necessary. Therefore, Sandage's testimony that he put the car "where it needed to go," does not undermine the obviousness of the alleged defect. Even the opinion of Sandage's expert-that the product is unreasonably dangerous because it allowed only a six

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[3] Juries typically consider claims where the alleged defect is not obvious or is latent. *See, e.g. Rauscher v. General Motors Corp.*, 905 S.W.2d 158,160 (Mo.Ct.App.1995)(finding that a jury could surely find that an automobile that is subject to unpredictable stalls and stops is in a defective condition which is unreasonably dangerous); *Patterson v. Foster Forbes Glass Co.*, 674 S.W.2d 599(Mo. Ct. App. 1984) (baby bottle unpredictably exploded after a years use).

and one-quarter inch space for exit[4] -suggests the obviousness of the alleged defect.

Second, the "consumer expectation" test requires that the product be "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Restatement (Second) of Torts* § 402A cmt. i(1965); *see Pree*, 983 F.2d at 865 & 867 (citing *Cryts v. Ford Motor Co.*, 571 S.W.2d 683,688 (Mo. Ct. App. 1978) and *Restatement (Second) of Torts* § 402A, cmt. i); *see also Linegar*, 909 F.2d at 1153-1154; *cf. Newman v. Ford Motor Co.*, 975 S.W.2d 147, 153-154 (Mo. 1998)(en banc) (although Missouri courts have not expressly adopted the consumer expectation test, litigants are free to argue any theories of unreasonably dangerous). *But see Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496,506 (8th Cir. 1993) (finding Missouri courts have not expressly adopted the consumer expectation test) (citing *Nesselrode*, 707 S.W.2d at 377). Sandage expected that if he parked a vehicle near a post, the door would hit the post when opened. With his vast experience loading vehicles, he knew the exit space would be smaller the further he pulled forward. Thus, the product cannot be said to be dangerous beyond the expectation of the ordinary consumer with knowledge as to its characteristics.

Something so obvious, and within the expectation of a consumer with knowledge of the characteristics is not defective and unreasonably dangerous. *See Linegar*, 909 F.2d at 1153-54 (relying upon the open and obvious nature of the product and the

---

[4] We do not understand how an expert could reach such a precise measurement of the exit space available to Sandage and thereby declare the product unreasonably dangerous, given Sandage's vague and equivocal testimony. He could not remember where the car was parked, how far forward he pulled, where the door struck the side-posts, or even if he pulled the car forward or backed-in the car.

consumer expectation test to conclude that the product was neither defective nor unreasonably dangerous). The district court "should have declared as a matter of law, that the [trailer modifications] were not defective" and unreasonably dangerous. *Pree*, 983F.2d at 867; *see also Linegar*, 909f.2d at 1153 (finding the district court should have made the decision as a matter of law and directed a verdict or granted judgment notwithstanding the verdict).

B. Negligence

The negligence theory suffers flaws similar to those illustrated with the strict liability claim. A negligence claim requires proof of a duty, the breach thereof, and proximately caused damages. *See Morrison v. Kubota Tractor Corp.*, 891 S.W.2d 422, 425(Mo.Ct.App. 1994). Bankhead argues that the evidence fails to establish a duty because any allegedly defective and dangerous condition was obvious and apparent. "In a negligence action, whether a duty exists is entirely a question of law for the court." *Id.*

The Missouri Supreme Court has drawn the line on negligence claims, stating that:

[W]here the product if free of latent defects and concealed dangers; where the perilous nature of the product and the danger of using it is obvious and not concealed; where its normal function creates no danger no known to or appreciated by the user; where it is properly manufactured to accomplish the function for which it is designed, the manufacturer has "satisfied the law's demand..."

Stevens v. Durbin-Durco, Inc., 377 S.W.2d 343,348 (Mo. 1964); *see Morrison*, 891 S.W.2d at 426.

As noted, the modifications to the trailer were obvious and the danger patently clear. Nevertheless, Sandage argues that the

danger was not "appreciated." This argument is disingenuous given the evidence depicting years of using these trailers and thousands of loadings. *Cf. Morrison*, 891 S.W.2d at 427 (discussing the years of experience and understanding of the product). Any ordinary and reasonable person could easily see that the car door was blocked and there was not enough room to exit safely. The jury looked beyond the mark, and we cannot uphold this verdict as a matter of law.

III. CONCLUSION

For the foregoing reasons, we conclude that judgment as a matter of law should have been granted and therefore reverse and remand for entry of judgment in favor of Bankhead.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 98-2171EMSL

Samuel Sandage, Cheryl Sandage,	*	
	*	
Appellees,	*	Order Denying
	*	Petition for
v.	*	Rehearing and
	*	for Rehearing
Bankhead Enterprises, Inc., etc.,	*	En Bank
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

June 18, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SAMUEL SANDAGE, et al.,	)	
	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No.
	)	4:9CV00027 GFG
	)	
BANKHEAD ENTERPRISES, INC., et al.,	)	
	)	
	)	
Defendant(s).	)	

MEMORANDUM AND ORDER

This matter is before the Court on a renewed motion by defendant Bankhead Enterprises, Inc. (Bankhead) for judgment as a matter of law (Doc. 139), a motion by Bankhead for a new trial (Doc. 140), and on bills of costs and supporting documentation submitted by plaintiffs (Doc. 144) and by defendant Cottrell, Inc. (Cottrell) (Doc. 148).

The Court has considered the arguments set forth by Bankhead in its renewed motion for judgment as a matter of law and finds them to be without merit. The motion will be denied. Included in Bankhead's motion for a new trial is a request for remittitur. Considering the evidence in the light most favorable to the jury verdict, the Court finds that the jury award is not grossly excessive. *See Vanskike v. Union Pacific R.R.*, 725 F.2d 1146,

1150-51 (8th Cir. 1984) (in declining to remit jury award, court noted hesitance to overturn verdict that includes damages for pain and suffering); *Howard v. Lundry*, 591 S.W.2d 193, 200-01 (Mo. Ct. App. 1979) (primarily function of jury to fix amount of damages). The Court further finds the remaining points in Bankhead's motion for a new trial to be without merit. The motion will be denied.

Plaintiffs' bill of costs is unopposed, and the Court finds the costs to be reasonable and well-documented. Thus, the Court will award costs of $1,812.70 against defendant Bankhead. Cottrell originally filed a "Memorandum for Court," setting out it's costs in it's own format. (Doc. 145.) Plaintiffs responded to the memorandum, arguing that it was unclear against whom Cottrell was seeking costs, the memorandum was not in the required form, and the Court's order had awarded costs only to the plaintiffs. Because Cottrell subsequently submitted a bill of costs on the proper form provided by the clerk's office, Cottrell's original memorandum of costs will be denied as moot. Cottrell's subsequent bill of costs clarified that costs were sought against plaintiffs. Although the Court's judgment on the jury verdict did not specifically award costs to Cottrell, "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d)(1). Because Cottrell was found not liable to plaintiffs, it was a prevailing party entitled to costs against plaintiffs. *See Milton v. City of Des Moines*, 47 F.3d 944, 947 (8th Cir.), *cert. denied*, 516 U.S. 824 (1995.) Plaintiffs do not dispute the amount of costs claimed by Cottrell. The Court finds Cottrell's costs to be reasonable. Accordingly, the Court will award costs of $3,589.07 against plaintiffs.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion for judgment as a matter of law (Doc. 140) is denied.

IT IS FURTHER ORDERED that defendant's motion for new trial (Doc. 139) is DENIED.

IT IS FURTHER ORDERED that defendant Bankhead is liable to plaintiffs for costs in the amount of $1,812.70.

IT IS FURTHER ORDERED that plaintiff is liable to defendant Cottrell for costs in the amount of $3,589.07.

IT IS FURTHER ORDERED that all other pending motions are denied as moot.

Dated this 23rd day of March, 1998.

By: /s/George F. Gunn, Jr.
GEORGE F. GUNN, JR.
SENIOR UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
OCT 21 1999
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No. 99-471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

SAMUEL AND CHERYL SANDAGE
Petitioners,

v.

BANKHEAD ENTERPRISES, INC.
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERITIORARI

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QUESTIONS PRESENTED

(1) Whether certiorari is appropriate for the sole purpose of reviewing a federal court of appeals' application of state law in a diversity case.

(2) Whether the record supported the appellate court's holding that, as a matter of law, an auto hauler trailer was not defective and unreasonably dangerous simply because a person positioning a car next to a support post might not be able to open fully the car door.

PARTIES BELOW

Petitioners Samuel Sandage and Cheryl Sandage were plaintiffs in the district court and appellees in the court of appeals. Respondent Bankhead Enterprises, Inc. was a defendant in the district court and appellant in the court of appeals. Cottrell, Inc. was a defendant in the district court but was not a party to the proceeding in the court of appeals.

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STATUTORY PROVISIONS INVOLVED

Missouri Revised Statutes §537.765 (1994) is accurately quoted by petitioners. However, respondent disagrees that §537.765 is implicated by the court of appeals' holding in this case.

STATEMENT OF THE CASE

As of December 17, 1990, petitioner Samuel Sandage had been working for almost ten years as a driver of tractor-trailers used to transport automobiles. Petitioner's Appendix at A-2 ("A-2"). Mr. Sandage had loaded as many as approximately 2700 cars each year. *Id.* On December 17, 1990, he was loading vehicles onto a Cottrell Model CS-11 trailer, manufactured by Cottrell, Inc. A-3. As originally manufactured, the CS-11 carried up to eleven vehicles, to be loaded at various numbered positions on the trailer. A-2. At the request of Cassens Transport, Mr. Sandage's employer, the CS-11 had been modified by respondent Bankhead, which had added four feet to the length of the trailer, so that the trailer might hold more and larger vehicles. *Id.*

Mr. Sandage claimed that he was injured when loading a car into the number one position on the modified CS-11. A-3. Mr. Sandage could not remember whether he drove the car forward onto the trailer or backed it in or how far toward the front of the trailer he positioned the car. A-3. Mr. Sandage testified he was unable to open the car door all the way because he had placed it next to a support post. *Id.* At trial, however, Mr. Sandage was unable to say whether the door he was attempting to open was blocked by the original support post that had been on the unmodified Cottrell trailer or by the supporting material added by Bankhead. Mr. Sandage testified that he was injured when he attempted to "squeeze" out of the partially opened door. A-3.

Petitioners claimed that the trailer as modified by Bankhead was defective and unreasonably dangerous because it was possible to place a car in the number one position such that the driver's door could not be opened wide enough to allow safe egress from the car.

In denying Bankhead's motion for judgment as a matter of law, United States District Judge George Gunn stated that the

case was very close, but that he intended to submit the case to the jury because he believed that is what the Eighth Circuit would prefer.

On appeal, the United States Court of Appeals for the Eighth Circuit held that plaintiffs had failed to make a submissible case on their claim of strict liability or negligent design defect. The court held that the trailer was not defective and unreasonably dangerous as a matter of law and that Bankhead was entitled to judgment in its favor. A-4 - A-9.

Contrary to petitioners' statement of the case, the Eighth Circuit did not hold that the "defect was 'open and obvious.'" Petition at 3. The court of appeals did not find that there was any "defect." The court also recognized that any danger associated with the location of support posts and loading cars was patent. A-5 - A-8.

REASONS FOR DENYING THE WRIT

1. CERTIORARI SHOULD NOT BE GRANTED FOR THE SOLE PURPOSE OF DECIDING A STATE LAW QUESTION RULED UPON BY A FEDERAL COURT OF APPEALS.

While admitting that this Court normally does not grant petitions for certiorari solely to review a federal court's application of state law, petitioners claim that this case presents one of those rare circumstances when such review is justified. Petition at 4. Clearly it does not. The Eighth Circuit's judgment involves nothing more than the type of interpretation and application of state law that is commonplace in diversity cases, and is exactly the type of judgment for which certiorari is not appropriate.

Leavitt v. Jane L., 518 U.S. 137, 116 S.Ct. 2068 (1996), on which petitioners rely, offers no support for granting certiorari in this case. In *Leavitt*, the court of appeals had invalidated an entire Utah abortion statute based on a finding that one section was unconstitutional and that other sections were not severable. 518 U.S. at 139-40. The court of appeals reached this conclusion despite a state statute explicitly stating that the statutory provisions were severable. *Id.* In granting certiorari, this Court specifically noted that the effect of the court of appeals' decision was to make a state statute completely unenforceable, on constitutional grounds, anywhere in the state. 518 U.S. at 144-45. The Court also noted the national importance of the underlying substantive issue. *Id.* at 145. On the other hand, the Eighth Circuit's interpretation and application of Missouri product liability law to Mr. Sandage's claim has no such statewide impact or national significance.

Petitioners also criticize the Eighth Circuit panel, "consisting of judges from South Dakota, Nebraska, and Minnesota," for reversing "an Eastern District Court of Missouri on a point of Missouri law." Petition at 4. As this Court held in *Salve Regina*

College v. Russell, 499 U.S.225, 231, 111 S.Ct. 1217, 1220-21, 113 L.Ed.2d 190 (1991), the court of appeals is to review the district court's determination of state law *de novo*, without deference.

In addition, the record contradicts petitioners' suggestion that the district court unequivocally rejected Bankhead's motion for judgment as a matter of law filed at the close of the evidence. In fact, in response to Bankhead's motion, the district court openly expressed its uncertainty about whether petitioners had made a submissible case. The district court, however, decided that the most efficient resolution of its uncertainty was to submit the case to the jury and let the Eighth Circuit finally resolve the issue of submissibility.

> THE COURT: Well, I think the whole case is extremely close. I'm going to go ahead and let it go to the jury because I think the Eighth Circuit would rather have it that way than my ruling on a judgment as a matter of law, and if I'm wrong, then the case would have to be tried all over again. If I'm – if we let it go to the jury, then they can say I was either wrong in letting it go to the jury or affirm what the jury does, so we'll let it go to the jury.

Tr. 4-56. The Eighth Circuit did not undermine the district court's assessment, but rather conducted exactly the type of independent review the district court expected.

2. THE EIGHTH CIRCUIT'S HOLDING IS CONSISTENT WITH MISSOURI PRODUCTS LIABILITY LAW.

As petitioners interpret Missouri product liability, the trial and appellate courts no longer have any authority to determine, as a matter of law, whether a plaintiff has made a submissible claim that a product is defective and unreasonably dangerous. The

cases cited by petitioners do not support such a rigid narrowing of the role of the courts in reviewing a plaintiff's case. In fact, when a party challenges submissibility, the court of appeals is not only entitled but obligated to determine whether plaintiff has made a submissible design defect case. Both before and after the enactment of §§ 537.760 and 537.765 RSMo (1994), the determination of whether a product is defective and unreasonably dangerous includes consideration of whether the alleged "defect" is open and obvious and whether any danger associated with the use of the product exceeds that reasonably anticipated by the ordinary consumer of the product. *See Miller v. Varity Corp.*, 922 S.W.2d 821, 825 (Mo. App. 1996) (open and obvious nature of a claimed defect can be properly considered); *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 153-54 (Mo. banc 1998) (although Missouri courts have not expressly adopted the consumer expectation test, it remains one of the theories of unreasonably dangerous).

Petitioners apparently argue that, no matter how obvious and fundamental the characteristics of a product, a court may never hold that the product is not defective or unreasonably dangerous as a matter of law. The cases cited by petitioners do not so hold. The fact that determinations of "defect" and "unreasonable danger" may regularly be jury issues does not mean that they are *always* jury issues, just as the fact that negligence is generally a jury issue does not mean that a court is precluded from ever directing a verdict in a negligence case. As it is obligated to do in the face of a claim that plaintiff failed to make a submissible case, the Eighth Circuit reviewed the relevant evidence and properly concluded, as a matter of law, that the CS-11 was not defective and unreasonably dangerous simply because it was possible to load a vehicle near a support post.

Petitioners argue that the Eighth Circuit erred in citing *Pree v. Brunswick Corp.*, 983 F.2d 863 (8th Cir. 1993) and *Linegar v. Armour of Am., Inc.*, 909 F.2d 1150, 1154 (8th Cir. 1990), because

both of those causes of action arose prior to the effective date of the Missouri products liability statute, § 537.760, *et seq.*, RSMo (1994). Bankhead cited and discussed both *Pree* and *Linegar* in its opening brief in the Eighth Circuit. In their appellees' brief filed in the Eighth Circuit, however, petitioners *never* mentioned, much less attempted to distinguish, either *Pree* or *Linegar*, and *never* argued that the holdings in those cases were no longer valid after passage of Missouri's product liability statute. Petitioners first made that argument in their petition for rehearing.

Petitioners also overstate the impact of § 537.765, which abolished contributory fault as a complete bar to recovery and adopted comparative fault in strict product liability cases. Petition at 1-2. On its face, § 537.765 addresses the fault of the plaintiff, necessarily involving a subjective analysis of the individual plaintiff's knowledge, not the issue of whether the condition of the product is open and obvious as a matter of law, an objective analysis. Again, in their brief filed in the Eighth Circuit, petitioners never argued that the open and obvious condition of a product is relevant only to comparative fault under § 537.765. Rather, in their Eighth Circuit brief, petitioners referred to § 537.765 only in response to Bankhead's discussion of Mr. Sandage's substantial personal experience in loading trailers, which petitioners characterized as an assumption of risk defense. Petitioners should not be permitted to seek certiorari based on an analysis of § 537.765 not contained in their brief in the court of appeals.

Petitioners mischaracterize the holding and analysis of the Missouri court of appeals in *Wilson v. Danuser Machine Company, Inc.*, 874 S.W.2d 507 (Mo. App. S.D. 1994). Petition at 6. The court in *Wilson* did not consider § 537.765 with regard to plaintiff's claim that the log splitter was defective and unreasonable dangerous. The Court in *Wilson* discussed § 537.765 only in the context of plaintiff's claim that defendant Danuser had failed to make a submissible case of comparative fault. The

Wilson court's discussion of submissibility never mentions §537.765, but rather focuses on whether plaintiff was required to show that the product had failed or malfunctioned. Moreover, in affirming the judgment, the court of appeals in *Wilson* also discussed *Linegar v. Armour of America, Inc.*, 909 F.2d 1150, one of the cases cited by the Eighth Circuit in this appeal. In distinguishing *Linegar*, the court in *Wilson* never suggests that the holding or rationale in *Linegar* had been undermined by the enactment of § 537.765. *Wilson* simply does not support petitioners' argument that the Eighth Circuit misapplied Missouri law.[1]

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[1] Petitioners request that, on grant of certiorari, they are entitled to "reversal of the judgment of the Eighth Circuit and a remand with instructions to reinstate the verdict of the jury and the judgment of the trial court." Petition at 8. Even were the Court somehow to conclude that it should grant certiorari solely to review the Eighth Circuit's application of Missouri common law and further that the Eighth Circuit had erred in applying that law, petitioners still would not be entitled to reinstatement of the judgment of the trial court. In addition to demonstrating that the modified trailer was neither defective nor unreasonably dangerous, Bankhead also raised substantial issues concerning petitioners' failure to prove causation and the trial court's erroneous admission of plaintiff's expert's testimony. Because of its holding, the Eighth Circuit did not reach these issues.

CONCLUSION

The Eighth Circuit's reversal of the district court's judgment reflects a proper application of Missouri product liability law to the facts of this case, and does not "nullify a Missouri statute [or] attempt to re-create federal common law." Petition at 8. For the reasons stated, certiorari should be denied.

Respectfully submitted,

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